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Information/Action

General Session

Review and Discussion of the Role of Ex-Officio Representatives in Closed Session Activities

AGENDA INSERT

Executive Summary: The Commission will discuss the role of Ex-Officio Representatives in Closed Session activities.

Presenter: Mary Armstrong, General Counsel

Strategic Plan Goal(s): 1

Promote educational excellence through the preparation and certification of professional educators.

Review and Discussion of the Role of Ex-Officio Representatives in Closed Session Activities

Summary

The Commission will discuss the role of Ex-Officio Representatives in closed session activities.

Discussion

Questions have been raised by several ex-officio representatives regarding their role in Closed Session activities of the Commission. In order to discuss this item, staff has prepared the following general background information and analysis for the Commission's consideration.

1. **Are the ex officio representatives appointed by The Regents of the University of California, the Trustees of the California State University, the California Postsecondary Education Commission, and the Association of Independent California Colleges and Universities (hereinafter Representatives) pursuant to section 44212 of the Education Code¹ members of the Commission on Teacher Credentialing (hereinafter Commission)?**

The Representatives appointed pursuant to section 44212 are not members of the Commission.

Section 44210 establishes the Commission and reads in pertinent part, as follows:

There is hereby established in the state government the Commission on Teacher Credentialing, to consist of 15 voting members, 14 of whom shall be appointed by the Governor with the advice and consent of the Senate, as specified in subdivisions (b) to (g), inclusive. The commission shall consist of the following members:

- (a) The Superintendent of Public Instruction or his or her designee.
- (b) Six practicing teachers from public elementary and secondary schools in California.
- (c) One person who is employed on the basis of a services credential other than an administrative services credential.
- (d) One member of a school district governing board.

¹ All statutory references are to the Education Code unless otherwise specified.

- (e) Four representatives of the public. None of these persons shall have been employed by an elementary or secondary school district in a position requiring certification, or shall have served as a school district governing board member in the five-year period immediately prior to his or her appointment to the commission.
- (f) One school administrator in a public elementary or secondary school in California.
- (g) One faculty member from a college or university that grants baccalaureate degrees.

To ascertain the meaning of a statute, we begin with the language in which the statute is framed (Leroy T. v. Workmen's Comp. Appeals Bd. (1974) 12 Cal.3d 434, 438; Visalia School Dist. v. Workers' Comp. Appeals Bd. (1995) 40 Cal. App. 4th 1211, 1220). When the language of a statute is clear, its plain meaning should be followed (Droeger v. Friedman, Sloan & Ross (1991) 54 Cal.3d 26, 38). In this instance the plain language of section 44210 is that the Commission consists of 15 members and those members are set forth in specific detail. In enacting any law, the Legislature is presumed to have had knowledge of existing statutory law and judicial decisions pertaining to the subject matter of that law (see Bailey v. Superior Court (1977) 19 Cal. 3d 970, fn. 10, at 977-978). Section 44212, which addresses the appointment of representatives, was enacted at the same time and both sections were last amended at the same time (see Stats. 1976, c. 1010 sec. 1010 and Stats. 1988, c. 1355, secs. 4.5 and 4.7.) Had the Legislature intended the Representatives to be members of the Commission, it would have made it clear at the time by including them in the language of section 44210 or cross-referencing section 44212.

2. Are the Representatives “ex officio” members of the Commission in that term’s usual and customary meaning?

The Representatives are not “ex officio” members of the Commission in that term’s usual and customary meaning.

Section 44212 requires specified entities to appoint one representative to the Commission and reads as follows:

The Regents of the University of California, the Trustees of the California State University, the California Postsecondary Education Commission, and the Association of Independent California Colleges and Universities shall each appoint a representative to serve as member ex officio without vote in proceedings of the commission.

The ex officio members shall not vote in any proceedings of the commission nor in any of its committees or subcommittees, except, by a majority vote of the commission, ex officio members may be permitted to vote in committees or subcommittees in order to establish a quorum or as otherwise determined by majority vote of the commission.

Normally, statutory terms should be construed in accordance with the usual and ordinary meaning of the words used (People v. Snook (1997) 16 Cal. 4th 1210, 1215). The legislature used the term “ex officio” in section 44212. The definition of “ex officio” is “from office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office.” (Black’s Law Dictionary, 6th Edition, p. 575) Despite the use of the term “ex officio,” the actual language of section 44212 does not comport with definition of the term. The representatives of the various entities do not hold their positions by virtue of an office. The entity identified in the statute is authorized to appoint a representative. The power is not given to a single identified official, but to an identified entity. To be a true “ex officio” member, a specific identified position would be a member of the Commission. Whoever occupied that position would be, by operation of law, an ex officio member of the Commission. No other act would be necessary. Section 44212 gives four organizations the authority to appoint a representative who is not an “ex officio” member as the term is usually and customarily used.

The Office of the Attorney General also reached the conclusion that the Representatives appointed under section 44212 are not “ex officio” members of the Commission. Though clearly not controlling authority, the opinions of the Attorney General are accorded great respect by the courts. (Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 30; Wenke v. Hitchcock (1972) 6 Cal. 3d 746, 751-752.) In response to a request for an opinion made by the Commission related to disclosure of information discussed in Executive Session of the Commission by the designee of the Superintendent of Public Instruction, the Attorney General discussed the nature of the membership of the Commission. (72 Ops. Cal. Atty. Gen. 159 (1989); Opinion No. 89-301) The Attorney General concluded that “The Superintendent is the only "ex officio" member of the Commission; he is a Commission member by virtue of his constitutional office. His powers as a Commission member are by operation of law. (§ 44210.) In contrast, the other Commission members are selected by the Governor with the advice and consent of the Senate. (Ibid.) Their Commission powers are not conferred upon them by operation of law but rather by the act of an individual, the Governor.” (Emphasis added) In reaching the conclusion that there was only one “ex officio” member of the Commission, the Attorney General was aware that the Representatives existed and referenced them in a footnote.

3. Absent the need to establish a quorum as provided in section 44212, may Representatives attend closed sessions of the Commission?

In some circumstances, if approved by a majority vote of the Commission members, Representatives may attend closed sessions of the Commission; however, there is no legal authority mandating such attendance. Questions are also raised by attendance or participation of Representatives at closed sessions when the Commission is performing its adjudicative function involving the discipline of credential holders or when discussing potential or pending litigation.

The second paragraph of section 44212 authorizes the Commission to confer voting privileges on the Representatives in committees and subcommittees in order to establish a quorum or as otherwise determined by a majority vote of the Commission. The last phrase

has been construed to authorize the Representatives to attend and vote in open and closed sessions of the full Commission where they were needed to establish a quorum (CCTC Policy Manual, Sec. 412, January, 2004.)

In cases where the Representatives have not been granted voting privileges, the fact that they are not members or “ex officio” members of the Commission requires a case by case analysis of each type of closed session. For purposes of public meetings, the Commission is governed by the Bagley-Keene Open Meetings Act (hereinafter the Act), which is set forth in sections 11120-11132 of the Government Code. Generally speaking, the public has a right to be noticed about meetings and to attend all meetings. A specific statutory exception must exist to authorize a closed session and each has a different policy basis² The Commission has a specific exemption that allows, but does not require, a closed session when considering matters relating to the recruitment, appointment, or removal of its Executive Director (section 11126(g)(2) of the Government Code; see also section 44220(c).) The Commission is performing a governance function when it selects the Executive Director as he or she serves at the pleasure of the Commission (section 44220(a).)

When reviewing access to local sessions, courts will construe exceptions to open meetings acts narrowly (San Diego Union v. City Council of the City of San Diego (1983) 146 Cal. App. 3d 947, 954-955; 83 Cal. Op. Atty. Gen. 221 (2000); both interpreting the Ralph M. Brown Act, sections 54950-54962 of the Government Code.)³ The Attorney General made the following observation in an opinion that concluded that an alternate member of a local agency may not attend a closed session unless sitting in the place of an absent or disqualified member:

“In the pamphlet, *The Brown Act, Open Meetings For Local Legislative Bodies* (Cal. Dept. of Justice, 1994), we examined whether various interested persons could attend a closed meeting under the Ralph M. Brown Act:

*"In 46 Ops.Cal.Atty.Gen. 34 (1965), this office also concluded that meetings could not be semi-closed. Thus, certain interested members of the public may not be admitted to a closed session while the remainder of the public is excluded. Nor would it be proper for an investigative committee of a grand jury performing its duties of investigating the county's business to be admitted to a closed session. (I.L. 70-184.) As a general rule, closed sessions may involve only the membership of the body in question plus any additional support staff which may be required (e.g., attorney required to provide legal advice; supervisor [*11] may be required in connection with disciplinary proceeding; labor negotiator required*

² The criteria for holding a closed session are set forth in Government Code section 11126(a) – (b).

³ Although the opinion interprets the Brown Act, in situations where the Brown Act’s provisions are similar to Bagley-Keene, an interpretation of the Brown Act can be looked to for authority in interpreting Bagley-Keene.

for consultation). Persons without an official role in the meeting should not be present." (*Id.*, at p. 29, italics added.) (83 Ops. Cal. Atty. Gen. 221 (2000))”

The general rule is that closed session access is permitted only to people who have an official or essential role to play in the closed session meeting (Opinion of the Attorney General No. 03-604, p. 7 (2003).)

Accordingly, if the Commission finds that the Representatives have an official or essential role to play in the recruitment and appointment of the Commission’s Executive Director, they may allow the Representatives into closed session and not be in violation of the Act. Conversely, the Commission may also decide to open the interview process to the public and operate in open session, while at the same time, restricting the deliberative process to closed session.

The Commission is required to meet in closed session pursuant to section 44245 to adjudicate matters relating to discipline of credential holders. That section specifically states who may participate and, in relevant part, limits the participation to “commission members,” (section 44245(a).) As set forth above, the phrase, “commission member,” does not include the Representatives. In addition to the language of the statute, the Commission was advised by the Attorney General’s office that the participation of any non-voting individuals in these sessions raised legal concerns. As a result of this advice, the Commission’s current practice is that representatives are not included in closed sessions conducted pursuant to section 44245.

The Bagley-Keene Open Meetings Act also allows the Commission to meet in closed session pursuant to Government Code section 11126(e) to discuss pending or potential litigation matters with legal counsel. When such discussion takes place, it is protected from disclosure in any subsequent litigation by the attorney-client privilege. It is well settled that this privilege extends to the Commission acting through its duly authorized representatives and to relevant staff members. The privilege could be deemed waived if the Commission allowed attendance and participation by the representatives who are not members. In addition, the interest of the representatives and the entities they represent could be adverse to that of the Commission in potential litigation.